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No. 90-605

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,
v.
AIR TRANSPORT ASSOCIATION OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT AIR TRANSPORT ASSOCIATION OF AMERICA IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the government's challenge to the court of appeals decision, which required the Federal Aviation Administration to issue Rules of Practice for its Civil Penalty Proceedings only after notice and comment under the Administrative Procedure Act, still presents a justiciable case or controversy, even though the government (1) has fully complied with the court of appeals' judgment by issuing a Final Rule that was subject to notice and comment, and (2) has not reserved any right or stated any desire to rescind that Final Rule? If so,

2. Whether FAA's comprehensive Rules of Practice in Civil Penalty Proceedings were subject to the notice-and-comment requirements of the Administrative Procedure Act?

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This brief is submitted on behalf of respondent Air Transport Association of America in opposition to the United States Department of Transportation's petition for a writ of certiorari.[1]

COUNTER-STATEMENT OF THE CASE

The government's statement of the case is accurate as far as it goes. It notes, for example, that prior to

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[1] Respondent Air Transport Association of America is advised that the respondent-intervenors concur with this Brief and will not file separately.

the court of appeals' issuance of its opinion in this case, the Federal Aviation Administration ("FAA") had already initiated a proposed rulemaking that published, for notice and comment, many of the rules at issue here.

The government nevertheless omits an important fact. FAA initiated that rulemaking procedure entirely independently of this action and wholly out of deference to the Congress and the Administrative Conference of the United States. As FAA stated in its Notice of Proposed Rulemaking, that notice was "intended to fulfill a commitment made by the agency to the members of the House Subcommittee on Public Works and Transportation at [a] hearing held on November 15, 1990." 55 Fed. Reg. 7980 (March 6, 1990). At that hearing, the then-current rules of practice had "received a significant amount of criticism from the witnesses representing the aviation community," and "the nature and extent of that criticism resulted in only a 4-month [Congressional] extension of FAA's authority" to conduct civil penalty proceedings. 55 Fed. Reg. at 7981.

That Congressional Committee was not, however, the only governmental entity urging changes in the Rules of Practice. The Committee on Adjudication of the Administrative Conference of the United States likewise recommended changes. And FAA was careful to note that the changes it "proposed in the [March 6th Notice of Proposed Rulemaking] and adopted herein addressed the procedural modifications suggested by the Committee on Adjudication." 55 Fed. Reg. 15,110-15,111 (April 20, 1990); *see also* 55 Fed. Reg. at 7981.

Finally, after the court of appeals' judgment came down, FAA did not seek a stay, either from the court

of appeals or from this Court. Rather, as the government concedes, FAA fully complied with that judgment by publishing notice and receiving comment on a full set of amended proposed Rules of Practice for Civil Penalty Proceedings. 55 Fed. Reg. 15,134 (April 20, 1990).[2] Then, as the government acknowledges, "final, amended rules of practice were issued, after the agency had comments received from the public, on July 3, 1990." Petition for a Writ of Certiorari ("Pet."), at 7. *See* 55 Fed. Reg. 27,548 (July 3, 1990). Moreover, in publishing those Final Rules, FAA again noted that it was thereby satisfying several objections made to its former rules of procedure by the Administrative Conference. *See* 55 Fed. Reg. at 27,549.

In sum, the government acknowledges that it has already done everything required of it by the court of appeals. It neglects to mention, however, that those actions were taken partially out of obedience to the court of appeals, partially to satisfy a promise FAA had made to Congress, and partially out of deference to the Administrative Conference. These facts are important because they demonstrate the overwhelming likelihood that FAA will not revive its former, challenged rules even if it prevails in this Court.

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[2] Indeed, FAA's amended rules did more than just comply with the Court of Appeals' judgment. Even though the Court of Appeals did not reach respondents' substantive challenges to the rules, FAA's amended rules nevertheless cured all of respondent's substantive objections.

REASONS FOR DENYING THE PETITION

It is very doubtful that there is any longer a live case or controversy among the parties. Of course, "[u]nder Article III of the Constitution this Court may only adjudicate actual, ongoing controversies. That the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires." *Honig* v. *Doe*, 484 U.S. 305, 317 (1988). *See also Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988).

1. Where, as here, a regulatory agency substantially changes regulations that are under challenge, and does not indicate any desire to revive its former regulations, the challenge is moot. Thus, in *Princeton University* v. *Schmidt*, 455 U.S. 100 (1982) (*per curiam*), this Court held that an action challenging certain University speech regulations that had since been modified was moot because the University showed no inclination to reinstate its former regulations. 455 U.S. at 103; *see City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 296 n.* (White, J., concurring in part and dissenting in part). Likewise, in *Cornelius* v. *N.A.A.C.P. Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985), the Court reached the merits of a challenge to superseded regulations, which had been invalidated by the court of appeals, only because "OPM's position before this Court [was] consistent with a desire to reinstate its prior regulations. Given these circumstances, the revision of the regulations at issue d[id] not render th[e] case moot." 473 U.S. at 791 n.1 (citation omitted). *See also Maher* v. *Roe*, 432 U.S. 464, 468-469 n.4 (1977) (revisions to challenged state regu-

lations, that were apparently made only "for the purpose of interim compliance," did not moot case "submitted on the theory that Connecticut desires to reinstate the invalidated regulation"); *Chemical Manufacturers Association* v. *National Resources Defense Council, Inc.*, 470 U.S. 116, 136 n.2 (1985) (Marshall, J., dissenting in part) (joined by Blackmun, Stevens and O'Connor, J.J.) ("EPA's position before this Court is consistent with the view that it desires to reinstate its prior regulation. Given all of these circumstances, the revision of the regulation does not render this case moot.").[3]

The government's petition in this case, however, carefully avoids making any representation that FAA plans to revive its former regulations. It is easy to see why. As the government acknowledges, many of its changes to the Rules of Practice were made for reasons entirely independent of this case. They were "intended to fulfill a commitment made by the agency to the members of the House Subcommittee on Public Works and Transportation . . . ." (55 Fed. Reg. at 7980), and were apparently also motivated in part by certain criticisms made by the Administrative Conference. *See* 55 Fed. Reg. at 7981 ("The agency has . . . propose[d] changes to the rules of practice that address the recommended revisions . . . contained in" the draft report of the Administrative Conference.);

[3] The Court views claims of mootness somewhat more skeptically when it is the same party that voluntarily changed its requirements that seeks thereby to avoid federal court jurisdiction. *Cf. Princeton University*, 455 U.S. at 103, *with City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 288 & n.11 (1982). Nevertheless, even that higher standard may be met on a proper showing. *See, e.g., County of Los Angeles* v. *Davis*, 440 U.S. 625, 631-634 (1979).

see also 55 Fed. Reg. at 15,110; 55 Fed. Reg. at 27,549.

FAA will, no doubt, honor its commitment to the Congress regardless of how this Court might rule on the decision below. Moreover, the rules revised in response to Congress and out of deference to the Administrative Conference are thoroughly integrated with the revisions made out of obedience to the court of appeals. It is therefore unlikely in the extreme that FAA will offend Congress, the Administrative Conference and good sense by unravelling its regulations, discarding what this Court might permit it to discard but retaining what it has promised Congress it would keep.[4]

This case is therefore even more obviously moot than *Princeton University, supra.* There, "Princeton [merely] gave no indication that it desired to return to the original regulatory scheme and would do so absent a judicial barrier." *City of Mesquite,* 455 U.S. at 296 n.* (White, J., concurring in part and dissenting in part). Here, not only is there no indication by FAA that it would return to its former rules if permitted to do so, there is every indication that it will *not* return to its original rules, regardless of what this Court holds. Consequently, this case has "lost its character as a preesnt, live controversy of the kind that must exist if [courts] are to avoid advisory opinions on abstract propositions of law." *Hall* v. *Beals,* 396 U.S. 45, 48 n.5 (1969).

2. Respondent no longer possesses "such a personal stake in the outcome of the controversy as to

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[4] Indeed, were the FAA now partially to repeal its new regulations, its action would probably be vulnerable to challenge as arbitrary and capricious.

assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends . . ." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Respondent already has won all of what it sued to obtain. It challenged eight parts of the Rules of Practice. All eight parts were satisfactorily changed in the 1990 notice-and-comment rulemakings. Thus, respondent has nothing further to win in this Court. As a practical matter, respondent has nothing further to lose, either. Given the government's apparent lack of desire to revive its former regulations even if it prevails, respondent will continue to enjoy the benefits of the amended Rules of Practice regardless of whether it "wins" or "loses" here.

The government mistakenly claims that "at least some" of the parties to the case "retain an interest in [its] outcome." Pet. 23 n.20.1.[5] That is so, the government argues, because some respondents are membership organizations or air carriers "that are parties to [other] proceedings in which the Rules of Practice were applied at some point." *Ibid.* But that argument proves, at most, that those *other proceedings* are not yet moot. The present case neither concerns the substance of the regulations nor comprehends any civil penalty proceedings against anyone. (Indeed, for that reason, the government argued below that respondents' substantive challenge was not ripe. *See* Pet. App. at 7a).[6]

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[5] The government concedes that the "case is moot as to [the] individual[]" intervenors because the civil penalty proceedings previously pending against them have since been dismissed. Pet. 23 n.20.

[6] The court of appeals never reached respondents' substantive challenge to the regulations. *See* Pet. App. 7a.

All that remains of this case, therefore, is the government's philosophical disagreement with that portion of the court of appeals' judgment with which it has already fully and finally complied—the court's procedural ruling that whatever Rules of Practice FAA promulgated had to be subject to notice-and-comment under the A.P.A. That abstract legal question, which so fascinates the government, is of little interest to respondent. Respondent's concern throughout this litigation has been with the *substantive* provisions of the Rules of Practice. Now that FAA has revised the Rules, respondent is fully satisfied.

3. The government's argument that there is a split among the circuits is similarly rarified. The government does not claim that there is a split among the courts of appeals over either the substance of FAA's Rules of Practice or over whether their issuance required notice and hearing. Rather, the government points to a "square conflict" with *Southern California Edison Co.* v. *FERC*, 770 F.2d 779 (9th Cir. 1985), which held that a different provision of a different regulation—one concerned with the setting of utility rates—was not subject to notice-and-comment rulemaking. The conflict exists, the government explains, because the court of appeals in *Southern California Edison* rejected an argument under the A.P.A. similar to one the court of appeals accepted in this case.

Even assuming that this analytical divergence—which the government concedes is at least 11 years old (Pet. 20)—requires resolution by this Court,[7]

[7] As another indication of how "square" and "important" the supposed conflict is, the government did not even cite *Southern California Edison* to the court of appeals.

any such resolutions should await a true case or controversy that properly presents the question. If the government is correct in its prediction of the number of pending actions potentially affected by the court of appeals decision (Pet. 21-23), it should have little difficulty bringing an appropriate and live case to this Court's attention.[8]

CONCLUSION

For the stated reasons, the petition should be denied.

Respectfully submitted,

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December 5, 1990

[8] Indeed, according to the government's petition, one such case has already been fully briefed in the Sixth Circuit: *Playter* v. *F.A.A.*, No. 90-3420. *See* Pet. at 22 n.19.